No. 189.

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JAMES H. McKENNEY,
Clerk.

BRIEF OF PLAINTIFF IN ERROR.

Br. of Rose for P.C.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Filed Nov. 28, 1902.

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THE FARMERS AND MERCHANTS INSURANCE COMPANY,

*Plaintiff in Error,*

v.

FRANK DOBNEY,

*Defendant in Error.*

*IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.*

HALLECK F. ROSE,

*For Plaintiff in Error.*

(18,312.)

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HALLECK F. ROSE, *Counsel for Plaintiff in Error.*

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## BRIEF OF PLAINTIFF IN ERROR.

### I.

### Statement of the Case.

The plaintiff in error, an insurance company organized under the laws of Nebraska, was sued in the district court of Holt County, Nebraska, upon a policy of fire insurance written upon a dwelling house, including foundation. The insured tenement was part of the realty. The petition stating the cause of action is found in the printed record at pages 1 to 4.

After return of a verdict against the company, a motion for a new trial, assigning numerous errors, was filed in the

cause. This motion was subsequently overruled by the court and an exception taken (printed record, p. 16). At the time of overruling the motion for a new trial and entering judgment, there was embodied in the journal entry (printed record, p. 17) an order in the following words:

"The court finds there is due the plaintiff from the defendant, as a reasonable attorney's fee in this case, the sum of $150, and it is ordered and considered by the court that said $150 be taxed as part of the costs herein."

Under the practice obtaining in Nebraska, it is not necessary to assail the order taxing this item of costs by motion to retax. In this jurisdiction, if the liability of the party for costs is directly considered and determined by the trial court, it may be reviewed in the supreme court on petition in error, without any motion being interposed in the lower court to retax. (*Burton v. State,* 34 Neb., 125-127; *Hartford Fire Ins. Co. v. Corey,* 53 Neb., 209-212; *Lamaster v. Elliott,* 53 Neb., 424-430.)

Conforming to the practice obtaining in that jurisdiction, the company, by its petition in error in the supreme court, attacked the order above set forth taxing an attorney's fee of $150 against it in favor of plaintiff. The petition in error filed in the supreme court of Nebraska is found in the printed record at pages 38 to 40. The sixteenth, seventeenth and eighteenth assignments of error, in the petition addressed to that court, are as follows:

"16. The court erred in allowing an attorney's fee to plaintiff and ordering the same to be taxed as part of the costs.

"17. The taxation of an attorney's fee to plaintiff was without authority of law, and the said order is invalid and operates to deprive the defendant of its property without due process of law.

"18. Section 45 of chapter 43 of the Compiled Statutes, under which the court assumed to allow and order an attorney's fee to be taxed, is unconstitutional and void for

want of mutuality of the provisions, and for excluding defendant from the benefits and privileges thereby given to plaintiff, and for depriving defendant of the equal protection of the laws; in each of which particulars the said section is in conflict with section 1 of the fourteenth amendment to the Constitution of the United States, and in conflict with section 3 of article 1, and section 15 of article 3 of the Constitution of Nebraska."

The affirmance of the judgment in the state supreme court (printed record, p. 41) was necessarily an approval of the order taxing an attorney's fee. The opinion of Commissioner DAY, of the state supreme court, appears in the printed record at pages 41 to 47. The federal question raised, involving the validity of the order taxing $150 against the company for the use of the assured's attorney, was directly passed upon. The commissioner was of opinion that the act under which the attorney fee was allowed was invalid, but felt that the former rulings of the state court precluded him from so holding. From his opinion (printed record, pp. 46, 47), we quote the following:

"The district court, on the day the motion for a new trial was overruled, entered an order finding there was due the plaintiff from the defendant, a reasonable attorney's fee in the case in the sum of $150, and taxed this amount as part of the costs. This order was made under the authority of section 45, chapter 43, Compiled Statutes, which provided: 'The court upon rendering judgment against an insurance company, upon any such policy of insurance shall allow the plaintiff a reasonable sum as attorney's fee, to be taxed as a part of the costs.'

"A very able and exhaustive argument has been made by counsel for defendant, assailing this section of the law as unconstitutional, and, to the mind of the writer, at least, the argument seems to be founded upon good reason. The question, however, can hardly be said to be an open one *in this state.* The precise question has been decided by this court and many of the authorities cited in the brief of defendant were considered and reviewed by the court."

## II.

### Assignment of Errors.

The assignment of errors filed in the state supreme court by the company, presenting the federal question upon which a writ of error was allowed by Mr. Justice BREWER, contains the following specifications (printed record, pp. 48-49):

"1. The said supreme court of the State of Nebraska erred in affirming the judgment of the district court of Nebraska within and for Holt County.

"2. The said supreme court of the State of Nebraska erred in affirming the order of the district court of Holt County embodied in the journal entry in the words following: 'The court finds that there is due the plaintiff from the defendant, as a reasonable attorney's fee in this case, the sum of $150, and it is ordered and considered by the court that said $150 be taxed as part of the costs herein.'

"3. The said supreme court of the State of Nebraska erred in holding and deciding that section 45 of chapter 43 of the Compiled Statutes of Nebraska, under which the trial court assumed to allow and order an attorney's fee to be taxed, is not violative of the Constitution of the United States.

"4. The said supreme court of the State of Nebraska erred in holding that the Farmers & Merchants Insurance Company was liable to said Frank Dobney in the sum of $150, or any other sum, for an attorney's fee and in enforcing the provisions of section 3, chapter 48 of the Laws of Nebraska of 1889, and section 45 of chapter 43 of the Compiled Statutes of the State of Nebraska directing the taxation of an attorney's fee to plaintiff upon the rendition of judgment upon a policy insuring real estate, which said law is violative of that clause in section 1 of the 14th amendment to the Constitution of the United States, which declares that no state shall 'deny to any person within its jurisdiction the equal protection of the laws,' and, therefore, void.

"5. The said supreme court of the State of Nebraska erred in holding and deciding the statute of said State of

Nebraska in the words following, to-wit: 'The court upon rendering judgment against an insurance company upon such policy of insurance shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs,' to be valid and enforceable, and not in conflict with the Constitution of the United States, the said pretended statute being section 3 of chapter 48 of the Laws of Nebraska of 1889 and section 45 of chapter 43 of the Compiled Statutes of Nebraska.

"6. The said supreme court of the State of Nebraska erred in assuming authority to disregard the rule announced by the Supreme Court of the United States in the case of *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S., 150, upon the ground that said supreme court of Nebraska had theretofore committed itself to the contrary doctrine, and in denying the authoritative force of the precedents of the Supreme Court of the United States upon the question presented as to the validity of said law directing the taxation of an attorney's fee against an insurance company, and upon which question the said state court is a court of intermediate jurisdiction only."

## III.

## Argument.

**Section 3 of the valued policy law of Nebraska (Laws, 1889, ch. 48; Comp. Stats., ch. 43, sec. 45), directing the taxation of an attorney's fee to plaintiff on rendition of judgment on a policy insuring real estate, is violative of that clause in section 1 of the Fourteenth Amendment of the Constitution of the United States, which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws," and is therefore void.**

Since the state supreme court is but an intermediate tribunal, in matters involving construction of the federal constitution and statutes, it is somewhat remarkable that

it should attempt to justify a departure from the authoritative ruling of this court, upon the ground that its own decisions had committed the state court to the contrary doctrine. This is the situation, however, presented by the record in the case at bar. The sole question raised is as to the constitutional validity of that provision in the Statutes of Nebraska requiring the courts, upon rendering judgments against insurance companies, upon policies insuring realty fixtures, to allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as a part of the costs in the case. The particular provision is contained in chapter 48 of the Laws of Nebraska of 1889, "An act defining the liability of *fire* insurance companies in *certain cases*." The act contains three sections, which are also found in the Compiled Statutes of Nebraska, chapter 43, sections 43, 44 and 45. We here quote the act in full:

"Section 1. Whenever any policy of insurance shall be written to insure any real property in this state, against loss by fire, tornado or lightning and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages.

"Sec. 2. This act shall apply to all policies of insurance hereafter made or written upon real property in this state, and also to the renewal, which shall hereafter be made, of all policies heretofore written in this state, and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this state.

"Sec. 3. The court, upon rendering judgment against an insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs."

The provision for taxation of an attorney's fee relates solely to the administration of justice between the insurer and the insured, in the cases, only, where litigation proceeds to "judgment against an insurance company." It

grants a valuable pecuniary privilege to one party, as an incident to rendition of judgment in his favor—an undefined and unlimited sum to be fixed in the discretion of the court, termed part of the "costs." The language of the statute providing for its taxation as part of the costs excludes any idea of enforcement of any voluntarily assumed contract obligation. While giving this pecuniary advantage to plaintiff when successful, it exempts him from any corresponding obligation if he is unsuccessful in the litigation; and it likewise imposes a burden on the company failing in its defense, without any reciprocal benefit if it wins. One party is invited to sue without hazard of costs of his adversary's attorney; the other may only defend at the price of his adversay's attorney fee.

The mere reading of the statute is a sufficient answer to any suggestion that the obligation to pay attorney's fees, by virtue of the enactment, enters into and becomes a part of the contract obligation of the insurer. If such were intended to be the effect, why is it termed "costs" in the statute? The terms of the statute expressly exclude any such meaning. The full measure of liability under the contract is limited, fixed, and defined in section 1 of the act: "The amount of insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages." Section 3 purports only to affect the procedure and practice of courts in administering justice in this particular class of insurance cases. Awarding judgment for damages and costs is, in fact, the administration of justice; and such power must be exercised with due regard to the equal rights of both parties litigant. The statute may not offer one party a reward to sue, and impose on the other a penalty to induce surrender of right to defend.

It is equally clear that the imposition here does not apply to a class of business or a character of liability justifying imposition of penalties to secure life and property, or

to prevent commission of unlawful acts, under the police power. Of this class, statutes have been upheld imposing double damages for trespass, for failing to fence a railway, for taking illegal or excessive fees, and the like. In all these cases, the liability originates in the transgression of some law, the violation of some imposed public duty. The exercise of police power never has, and, so long as constitutional safeguards remain unimpaired, never can extend to mere violations of private contract rights not affecting public interests.

The obligation of the insurer rests on private contract. Liability matures, not by any act of the insurer, but through the casualty of a fire. The prompt enforcement of the insurer's obligations would not tend to lessen the number of conflagrations—the tendency would be rather to increase the dangers to the public from that cause. The insurer has no motive to use the torch; the insured sometimes has. Obligation to pay a loss, from the nature of the contract, cannot arise from violation of law by the *insurer;* it may be and sometimes is asserted by a *claimant* guilty of arson. It is clear, therefore, that the object aimed at, by the law under consideration, is enforcement of a private, individual, contract obligation, not affecting public interests; and so the law is not justifiable as an exercise of the police power of the state. The record, therefore, throws upon this court the responsibility of determining whether, under the clause of the federal constitution referred to, the state legislature has power so to debauch the administration of justice by discriminating between suitors, or parties to the same litigation, as to arm the plaintiff with special and important pecuniary advantages over his adversary at his adversary's cost?

Section 1, of Article XIV of Amendments to the Constitution of the United States, provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

*Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S., 150-165, is a controlling and conclusive precedent against the validity of the provision of the Nebraska law for taxation of an attorney's fee in this case. The case was on error to the supreme court of Texas to test the validity of an act of the legislature of that state providing for taxation of an attorney's fee of $10 in certain cases of claims against railroads, including "personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured," and where, after notice and failure for a stated term to pay, plaintiff recovered the full sum demanded. The opinion of Mr. Justice BREWER, holding the act unconstitutional, rests on two grounds, both of which are distinctly adjudged, and each of which is conclusive.

*First*—Under the equality clause of the Fourteenth Amendment the act under consideration was invalid, because requiring railroads in certain cases to pay attorney fees to parties successfully suing them, while giving them no like or corresponding benefit. On this point, Mr. Justice BREWER used the following language:

"It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants, under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney fees of the successful plaintiff; if it terminates in their favor they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the

courts upon equal terms. They must pay attorney fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

*Second*—The power of the states to make reasonable classifications, dealing alike with all persons of a certain class, is held, as a general proposition, not to be denied by the Fourteenth Amendment; but, to be valid, the classification must be a natural one, resting upon some reasonable ground, something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. The opinion also concedes that the equality clause does not prohibit the proper exercise of police power by the states; but holds it cannot be avoided by mere classification. We quote the concluding paragraph:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment; and that in all cases it must appear not only that a classification has been made, but also that it is one based on some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained."

That case cannot logically be distinguished from the one at bar. The duty to discharge a contract obligation is equal on all debtors, individuals, partnerships, companies, and corporations. The selection by the Nebraska law is purely an arbitrary one. The penalty is imposed only on fire insurance companies, and then only in certain cases where policies insure real property. It has no application to personalty risks. It does not apply to life and accident insurance, where measure of damages is uni-

formly liquidated and fixed by contract. Nor does it apply to any other contract debts. Its application is not even limited to valued risks, where the sum due is fixed and liquidated by contract. It is true real estate risks in Nebraska are now carried only by valued policies. But under valued policies the measure of damages is only liquidated in cases where the subject of insurance is wholly destroyed. In all other cases there is no difference between valued and open policies. But even in cases of partial loss, and with honest difference of opinion as to damages, this law applies. (*Ins. Co. v. Gustin*, 40 Neb., 828.) It cannot be held a natural classification. It is a purely arbitrary, discriminatory selection of a particularly narrow class of debtors, singled out from all others for the imposition of a penalty for presuming to defend against demands of a limited class of policy holders.

The act is exceptionally odious and pernicious because the penalty is uncertain, not to be anticipated in any case, but depending upon the claimant's cupidity and elasticity of conscience and the temper of the court fixing the amount of the fee. In this case on an $800 item a trial fee of $150 was taxed in the district court. The members of the profession are gradually learning to testify, without compunctions, that to prosecute an insurance case to judgment is worth from one-fourth to one-half the amount involved. Compared with the Nebraska law here in question, the encroachments of the Texas act on the constitutional rights of railroads were trivial. The limit there was $10. Here, while the right to claim salvage is *closed* to the defendant under a valued policy, the amount of additional liability that may be exacted by plaintiff by way of an attorney's fee is left open. However viewed, the act is violative of the equality clause of the Fourteenth Amendment, and under the precedent of *Ellis's case* it would seem to be the duty of this court to so adjudge it.

*Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S., 97, reinforces the rule in *Ellis's case* above referred to. While

this court there held valid a statute of Kansas providing for the assessment of an attorney's fee against railroads in cases where damages were recovered on account of fire caused by operating the railroad, it was stated in the opinion (p. 100): "The purpose of this statute is, as declared by the supreme court of Kansas, protection against fire—a matter in the nature of a police regulation." In the opinion (pp. 97-98) the doctrine of *Ellis's case* was reaffirmed in the following language:

"In support of this contention great reliance is placed upon *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S., 150 (41:666). In that case a statute of Texas allowing an attorney fee to the plaintiffs in actions against railroad corporations on claims not exceeding in amount $50, for personal services rendered or labor done, or for damages, or for overcharges on freight, or for stock killed or injured, was adjudged unconstitutional. It was held to be simply a statute imposing a penalty on railroad corporations for failing to pay certain debts, and not one to enforce compliance with any police regulations. It was so regarded by the supreme court of the state, and its construction was accepted in this court as correct. While the right to classify was conceded, it was said that such classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted; that no mere arbitrary selection can ever be justified by calling it classification. And there is no good reason why railroad corporations alone should be punished for not paying their debts. Compelling the payment of debts is not a police regulation. We see no reason to change the views then expressed, and if the statute before us were the counterpart of that, we should be content to refer to that case as conclusive."

It is not possible to justify the act in question as resting upon any reasonable classification bearing any just relation to any business or occupation sought to be controlled or regulated. Where a fire destroys the landlord's property and also the personal property of the tenant occupant, both landlord and tenant having insurance, the

rights of both against the insurance company should be equal. A law favoring the landlord in such case is wholly arbitrary and discriminatory. The character of the undertaking of the underwriter is identical in both cases, and his obligation to each is equally sacred. The law, in such case, making the landlord a favored suitor cannot be upheld on any precedent found in this court, and cannot be sustained upon principle.

The Nebraska court, in analogous cases, has itself upheld the position contended for by plaintiff in error. Its Code of Civil Procedure provides:

"Sec. 596. When a judgment or final order shall be affirmed in the supreme court, the said court shall also render judgment against the plaintiff in error for five per cent upon the amount due from him to defendant in error, unless the court shall enter upon its minutes that there was reasonable ground for the proceedings in error."

A constitutional provision of that state declares (art. 1, sec. 24):

"The right to be heard in all civil cases in the court of last resort by appeal, error, or otherwise, shall not be denied."

In *Moore v. Herron*, 17 Neb., 703, a motion to tax the penalty of five per cent. on affirmance was overruled, one ground of decision being that the imposition of the penalty was a violation of the constitutional provision above quoted. Speaking of the right of appeal the court said:

"This privilege is conferred as a *right*, and while the *unsuccessful party* may, and in most cases will, be taxed with the costs of the appellate proceedings, yet it is not the policy of the law to, in effect, declare that a wrong by the imposition of a penalty *which the fundamental law confers as a right.*"

At least twice the court has been asked to re-examine the point, and it has each time referred to that precedent

as conclusive, and approved the ruling. *Garneau v. Omaha Ptg. Co.*, 42 Neb., 847; *Coburn v. Watson*, 48 Neb., 257.

In *Atchison & N. R. Co. v. Baty*, 6 Neb., 147, the question before the court was as to the constitutionality of a law "giving to the owner of live stock double the value of his property injured, killed or destroyed" on a railroad track, in case the same is not paid in thirty days after demand.

Judge GANTT in his opinion said:

"It may be stated as an established maxim in the polity of the state, that the legislative authority cannot reach the life, liberty, or property of the individual, except when he is convicted of crime, or when the sacrifice of his property is demanded by a just regard of the public welfare.

"Now the statute in question is partial. It applies to one class only; but it is said that the lawmakers 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for the rich and poor, for the favorite at court and the countryman at plow,' and this rule is said to be 'a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.' Cooley Const. Lim., 392. In *Walley's Heirs v. Kennedy*, 2 Yerg., 554, it is held that 'the rights of every individual must stand or fall by the same rule, or law, that governs every member of the body politic, or land, under similar circumstances; and every private or partial law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void.' Hence, 'that is not legislation which prescribes a rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of government.'"

In *Grand I. & W. C. R. Co. v. Swinbank*, 51 Neb., 521, the court was asked to re-examine the constitutional question decided in *A. & N. R. Co. v. Baty*, but it refused to overturn the former ruling.

A law of Texas, passed in 1889, imposed as a condition of perfecting appeals by receivers, special provisions in all

cases touching appeal bonds. The validity of this law was raised in the supreme court of that state, which held (syllabus):

Such act is void, as it violates Const. Tex., art. 1, sec. 13, which declares that "all courts shall be open, and every person, for any injury done him * * * shall have remedy by due course of law," in that it denies to receivers the right to have judgments against them reviewed on the same terms as those prescribed in the case of other persons. *Dillingham v. Putnam*, 14 S. W. [Tex.], 303.

The court in the opinion in Dillingham's case, speaking of the constitutional provision that "all courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law," said:

"This applies to a *defendant* as well as a plaintiff. 'Due course of law,' in a cause tried in a district court, means a trial *according to the settled rules of law in that court;* and a further hearing in this court if either party to the litigation desires it after a final judgment in the trial court."

To the same effect are: *Durkee v. Janesville*, 28 Wis., 465-471; *South & N. A. R. Co. v. Morris*, 65 Ala., 199; *St. L., I. M. & S. Ry. v. Williams*, 49 Ark., 492-498; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss., 631-652.

*Durkee v. Janesville*, 28 Wis., 465-471, was an appeal from taxation of costs against the defendant city, contrary to a statute which declared that no costs shall be recovered against the city in any action where the same is commenced to set aside any tax assessment or tax deed, or to prevent the collection of taxes or assessments in said city. Chief Justice DIXON, in his opinion, said:

"Certainly no discrimination more arbitrary, unjust, and odious, between one individual or corporation and another, *or every other,* in a matter where the rights and privileges of all should be equal, could well be than would

thus be established if such acts were valid. The city of Janesville would have a special privilege or advantage not given to any other like corporation under the same circumstances. But the most odious feature of the law would appear from its application as between the immediate parties to the suit. No costs could be recovered against the city in this particular class of cases. That is the extent of the supposed suspension or repeal of the general law. Costs may be recovered by the city or taxed in its favor. In this case, had the city prevailed or the plaintiff been the losing party, costs must have been taxed against the plaintiff according to the general law. Thus, whilst the city would recover costs, upon judgment in its favor, it would pay none, and not be liable for any if the opposite party were successful. The costs and expenses taxable by law in every suit involving important questions like those affecting taxation and assessments are very considerable, and especially in this court. The costs here were taxed by the clerk at $141. If successful the city would have recovered them against the plaintiff; but if unsuccessful it is claimed that the plaintiff shall recover nothing. Words cannot make the inequality and injustice of the rule plainer than it thus appears; and the question is whether the legislature can so discriminate between suitors or parties to the same litigation in a court of justice as that one of them shall have such special and important pecuniary advantage over the other. I, for one, think not. * * *

"Section 9, article 1 [Const. Wis.], declares: Every person shall have *a certain remedy* in the laws for all injuries or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws. I had occasion to express my views of the proper construction and effect of this section in *Phelps v. Rooney*, 12 Wis., 705, 706. It is obvious there can be no *certain* remedy in the laws, where the legislature may prescribe one rule for one suitor *or class of suitors* in the courts, and another for all others under like circumstances, or may discriminate between *parties to the same suit*, giving one most unjust pecuniary advantage over the other. Parties thus discriminated against would not obtain justice freely and without being obliged to purchase it. To the extent

of such discrimination they would be obliged to buy justice and pay for it, thus making it a matter of purchase to those who could afford to pay, contrary to the letter and spirit of this provision.

"Certainty of remedies implies uniformity of remedy and equality of rights and privileges in all things respecting it, which can only be obtained by general laws, equally binding upon every member of the community. The language denotes that there can be but one remedy for all similar cases, which must operate upon all persons *or parties* alike, and be equally free and favorable to all.

"The grant of legislative powers, though without prohibition or restraint that the legislature shall not discriminate and do gross and palpable injustice between man and man, by the passage of unequal and partial laws, does not carry with it the power to pass such laws. Such a power, from its very nature, is 'fore-prized' and taken out of the grant, without any express exception or limitation; and the act, though in form of law, yet not being within the scope of the authority conferred, is not legislation at all, and so is void."

To the same effect are: *Calder v. Bull*, 3 Dallas, 387, 388; *Fletcher v. Peck*, 6 Cranch, 143; *Wilkinson v. Leland*, 2 Peters, 656, 658; *Ferret v. Taylor*, 9 Cranch, 50.

*Wilder v. Chicago & W. M. Ry.*, 70 Mich., 382, 386, involved the validity of Act No. 234, Laws of 1885, Mich., allowing a plaintiff in a suit against a railroad company to recover for killing cattle, to tax as part of his costs, an attorney's fee of $25. In his opinion holding the law unconstitutional, MORSE, J., said:

"But the imposition of the attorney fee of $25 as costs cannot be upheld. The legislature cannot make unjust distinctions between classes of suitors without violating the spirit of the Constitution. Corporations have equal rights with natural persons as far as their privileges in the courts are concerned. They can sue and defend in all courts the same as natural persons, and the law must be administered as to them with the same equality and justice which it bestows upon every suitor, and without which the machinery of the law becomes the engine of tyranny. This

statute proposes to punish a railroad company for defending a suit brought against it with a penalty of $25, if it fails to successfully maintain its defense. The individual sues for the loss of his cow, and it is shown that such loss was occasioned by his own neglect, and through no fault of the company, and he thereby loses his suit; the railroad company can recovery only the ordinary statutory costs of $10 in justice's court; but if he succeeds because of the negligence of the company, the plaintiff is permitted to tax the $10 and an additional penalty of $25; for it is nothing more or less than a penalty. Calling it an 'attorney fee' does not change its real nature or effect. It is a punishment to the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist. *Durkee v. Janesville*, 28 Wis., 464, 468.

"Here the legislature has granted special advantages to one class at the expense and to the detriment of another, and has undertaken to make the courts themselves the active agents in this injustice, and to force them to impose penalties, in the disguise of costs, upon railroad companies for simply exercising, in certain cases, the common right of every person to make a defense in the courts when suits are brought against them." Followed in *Lafferty v. Chicago & W. M. Ry.*, 71 Mich., 37.

*San Antonio & A. P. Ry. v. Wilson*, 19 S. W. [Tex.], 910, involved the validity of a statute declaring that in event a railroad company refused to pay an employee within fifteen days of demand, "it shall be liable to pay such employee twenty per cent. on the amount due him as damages." The court held the act invalid and unconstitutional, because "not protecting alike the interest of employer and employee." In the opinion it is said:

"No well-considered case can be found *sustaining a penalty on an ordinary contract* where public interest was not

involved. Before the tribunals of justice the ordinary litigant can only recover his interest and costs, except where there is fraud, or acts on the border land of crime, where he may recover exemplary damages as a recompense to himself and punishment to the offender (Sedgw. Dam., 371; *Railway Co. v. Humes*, 115 U. S., 512). * * * We think that an exception that undertakes to single out a single class and attach a penalty to a failure to pay one class of their creditors is not 'the law of the land,' and cannot be sustained. *In re Zicbold*, 23 Fed. R., 791. * * * In the *Civil Rights Cases* the Supreme Court of the United States says, in speaking of the fourteenth amendment: 'It nullifies and makes void all state legislation and state action of every kind which impairs the privileges of citizens of the United States, or injuries them in life, liberty, or property, without due process of law, or denies to any of them the equal protection of the laws.' 109 U. S., 24; 3 Sup. Ct. R., 21."

In *Wally v. Kennedy*, 2 Yerg. [Tenn.], 554-557, an act directing dismissal of certain classes of suits, growing out of the reservations of land to heads of Indian families, upon a certain state of facts being made to appear, was held unconstitutional. In the opinion of the court, it was said:

"The rights of every individual must stand or fall by the same rule or *law* that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community and those who made the law by another; whereas a like general law affecting the whole community equally could not have been passed. * * * The part of the constitution referred to was intended to secure to weak and unpopular minorities and individuals equal rights with the majority, who, from the nature of our government, exercise the legislative power. Any other construction of the constitution would set up the majority

in the government as a many-headed tyrant, with capacity and power to oppress the minority at pleasure by odious laws binding on the latter."

To same effect are: *Bank v. Cooper,* 2 Yerg. [Tenn.], 605; *Jones v. Perry,* 10 Yerg. [Tenn.], 71-2; *Budd v. State,* 3 Humph. [Tenn.], 491.

The constitution of Alabama, Bill of Rights, provides:

"Sec. 14. That all courts shall be open, and that every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."

The Alabama Legislature (Code, sec. 1715) enacted:

"Any corporation, person, or persons owning or controlling any railroad in this state, or any complainant against such corporation, person, or persons taking an appeal from a decision rendered by a justice of the peace in suit for damages brought under the provisions of section 1711, and failing to sustain such appeal, or to reduce or increase the judgment before the appellate court, shall be liable for a reasonable attorney's fee incurred by reason of such appeal, to be assessed by the court, not to exceed twenty dollars; and the attorney's fee shall be part of the costs and collected as such."

In *South & N. A. R. Co. v. Morris,* 65 Ala., 199, the supreme court of that state, in its opinion declaring the above quoted section unconstitutional, said:

"The clear effect of these [constitutional] provisions is to place all persons, natural and corporate, as near as practicable upon a basis of equality in the enforcement and defense of their rights in courts of justice in this state, except so far as may be otherwise provided in the constitution. This right, though subject to legislative regulation, cannot be impaired or destroyed under the guise or device of being regulated. Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open handed

to another without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial, and discriminatory legislation, which secures this right to some favored class or classes, and denies it to others, who are thus excluded from the equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions. * * *

"The section of the Code under consideration (sec. 1715) prescribes a regulation of a peculiar and discriminative character in reference to certain appeals from justices of the peace. It is not general in its provisions, or applicable to all persons, but is confined to such as own or control railroads only; and it varies from the general law of the land by requiring the unsuccessful appellant, in this particular class of cases, to pay an attorney's fee, not to exceed $20. A law which would require all farmers who raise cotton to pay such a fee, in cases where cotton was the subject matter of litigation, and the owners of this staple were parties to the suit, would be so discriminating in its nature as to appear manifestly unconstitutional; and one which should confine the tax alone to physicians, or merchants, or ministers of the gospel would be glaring in its obnoxious repugnancy to those cardinal principles of free government which are found incorporated, perhaps, in the Bill of Rights of every State Constitution of the various commonwealths of the American government. * *

"The section in question is also violative of that clause in sec. 1, art. IV. [Fourteenth Amendment], of the Constitution of the United States, which declares that no state shall 'deny to any person within its jurisdiction *the equal protection of* its laws.' This guaranty was said by Justice Bradley in *Missouri v. Lewis* (101 U. S., 1 Otto, 22, 30), to include 'the equal right to resort to the appropriate courts for redress.' 'It means,' as was further said by the court, 'that no person, or class of persons, should be denied the same protection which is enjoyed by other persons, or other classes, in the same place and under like circumstances.'

"The same court, in *United States v. Cruikshank* (2 Otto, 542, 555) per WAITE, C. J., used the following language in discussing the foregoing constitutional clause: 'The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states, and it still remains there.'"

*St. L., I. M. & S. Ry. v. Williams*, 49 Ark., 492-498, involved the constitutionality of an act to provide for appointment of a board to assess damages; and if either party refused to abide by such assessment, and make it necessary for the other to sue, he should be taxed with an attorney's fee in event the judgment of the court was not more favorable than the award. In holding the act invalid the court said:

"The constitution of this state declares * * * that 'Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property, or character; he ought to obtain justice freely, and without purchase, completely and without denial, promptly and without delay, conformably to the laws.' Every one is entitled, under the constitution, to have his rights enforced, his wrongs redressed, and his liabilities determined in the courts, whenever it becomes necessary to compel their enforcement, redress, or adjustment, and when he is liable for damages, as the appellant is in this case, to have the damages he shall pay assessed by a jury. The legislature has no power to substitute boards of arbitration for the courts without the consent of parties, and make their awards obligatory, and the exercise of the right to seek the aid of the courts to obtain relief from a wrong, or impose upon any one a penalty for exercising such right."

In *Jolliffe v. Brown*, 14 Wash., 159, the court used the following language:

"Legislation requiring railroad companies to pay an attorney's fee in case of litigating such claims unsuccess-

fully, where none was imposed upon the plaintiff if unsuccessful, has been sustained in some instances, and generally *upon the ground that it was in the nature of a penalty for failure to perform a duty imposed by statute.* * * *

"It cannot be sustained here as a penalty, for, as has been said, there was no duty to fence imposed by statute. * * * There is a broad distinction to be recognized between legislation requiring a party to pay actual damages occasioned and that which would impose a penalty in addition thereto. Such legislation can be sustained only where the party on whom the penalty is imposed is in fault or guilty of a wrong. Considered as an attorney's fee, purely and simply, it distinguishes between classes of persons, and not as to subjects of litigation or classes of controversies, and by the weight of authority has been held to be unconstitution." Citing *Denver, etc., Ry. Co. v. Outcalt*, 2 Col. App., 395; *St. L., etc., R. Co. v. Williams*, 49 Ark., 492; *S. & N. A. R. Co. v. Morris*, 65 Ala., 193; *Wilder v. Chicago, etc., Ry. Co.*, 70 Mich., 382; *Chicago, etc., R. Co. v. Moss*, 60 Miss., 641.

*Grand Rapids Chair Co. v. Runnels*, 77 Mich., 104, 111, holds:

"Act No. 147, Laws of 1887, which provides for the taxation of a $5 attorney fee in favor of plaintiff in a suit to recover for personal services, as a part of his costs, is unconstitutional and void."

The above decision is based on the former precedents announced in cases involving attorney's fee assessed against railroads.

*Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss., 641-652, involved the constitutionality of an act providing "that whenever an appeal shall be taken from the judgment of any court in an action for damages brought by any citizen of this state against any corporation, a reasonable attorney's fee for the appellee shall be assessed by the court," etc. The court, in an extended opinion, holding the provision to be within the inhibition of the Bill of Rights, declaring "all courts shall be open," etc., said:

"The right of appeal cannot be fettered and clogged with reference to the parties litigant, or the attitude they occupy as plaintiff or defendant. All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law, and its instrumentalities. The same rule must exist for all in the same circumstances."

*Denver, etc., Ry. Co. v. Outcalt*, 2 Col. App., 406, holds also against the power to impose an attorney's fee against a railway company, except in cases where it is expressly made a penalty for violation of a positive statute.

We have not overlooked the holding in *Fidelity Mut. L. Ass'n v. Mettler*, 22 Sup. Ct. R., 662, decided May 5, 1902, since the suing out of the writ in this case, upholding a law of Texas imposing a penalty on life insurance companies for failure to pay death claims. Like Mr. Justice HARLAN, who dissented from the decision, we find ourselves unable to reconcile that case with the doctrine held in *Ellis's case* (165 U. S., 150). The court in *Mettler's case* ruled that the general business of life insurance is essentially different from that of fire insurance, and upheld the act of Texas as a reasonable and natural classification. The act there in question, however, unlike that of Nebraska, applied generally to all cases of claims under life insurance policies. The rule of classification in that case was not extended, however, to so fine a point that the legislature might discriminate between beneficiaries claiming under identical forms of contract. The present record imposes upon the court the duty of determining whether the rule as to classification can be carried so far as to award special privileges to the *landlord* whose tenement, or realty fixture, is destroyed, while withholding the same privileges from the *tenant* who suffers loss of his goods by the same identical casualty. If the rule be extended to cover the case suggested, then all constitutional checks and safe-

guards against discriminatory and partial legislation will be removed, and the legislature left at liberty to legislate, without restraint, against odious individuals, and the constitutional guaranty of equality will afford no protection whatever.

It is no answer to the constitutional question urged, to say that the plaintiff in error may quit business if unable to stand the exactions imposed. It has its property, securities, appliances, supplies, records, charts, maps, established agencies, and the good will which it took years of industry and watchfulness to acquire and build up. To require its relinquishment now by unjust legislative impositions is confiscation. Such a proposition can not be sustained upon principle. It is the rule of this and other courts that constitutional rights cannot even be lost by assent of the parties. The only means of preserving constitutional rights is for the court to put its restraining hand upon legislative encroachment on individual rights. Considerations of estoppel or of expediency should have no place with the courts when they are called upon to adjudicate constitutional rights. As was well said in *Commonwealth v. Conynghan,* 65 Pa. St., 84, "Were such considerations to prevail, the instrument, in time, would disappear altogether by attrition of repeated encroachments, and its very existence become traditionary." Mr. Justice MATTHEWS, in *Poindexter v. Greenhow,* 114 U. S., 270-308, said:

"Of what avail are written constitutions whose bills of rights, for the security of individual liberty, have been written, too often, in the blood of martyrs shed upon the battle field and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them; and that too with the sacred authority of law, not only compelling obedience, but entitled to respect?"

The act in question is "glaring in its obnoxious repug-

nance to those cardinal principles of free government which are found incorporated, perhaps, in the bill of rights in every state constitution of the various commonwealths of the American government," and to the equality clause of the fourteenth amendment to the federal constitution. It should, therefore, be adjudged void.

Respectfully submitted,

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LINCOLN, NEBRASKA, November 21, 1902.